Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DAVID R. KNAPP and GRK CORPORATION,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, pursuant to United States v. Gaudin No. 94-514, ___ U.S. ___ (1995), in a criminal prosecution for filing a false currency transaction report with the Internal Revenue Service, the trial court erred by failing to submit the question of "materiality" of the false statements to the jury?

2. Whether, in a criminal prosecution for filing a false currency transaction report with the Internal Revenue Service, the trial court erred by instructing the jury that "willfulness" may be proved if defendant acted with a bad purpose or evil motive?

3. Whether, in a criminal prosecution for conspiracy to money launder, the trial court erred by failing to submit to the jury the question of defendant's knowledge of an unlawful object of the conspiracy?

4. Whether, in a criminal prosecution for money laundering, the trial court erred by instructing the jury that the defendant "knowingly" laundered the proceeds of illegal activity if he was generally aware of his actions?

5. Whether, in a criminal prosecution for money laundering, the asserted erroneous instructions pertaining to conspiracy to money launder authorized the jury to find money laundering without proof of knowledge or intent to money launder?

6. Whether, in a criminal appeal raising for the first time trial court error in instructing the jury on elements of the crimes, review should be by "plain error" or reversible per se?

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PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

The petitioners, DAVID R. KNAPP and GRK CORPORATION, respectfully pray that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on April 15, 1995.

OPINIONS BELOW

On April 5, 1995, the Court of Appeals affirmed defendants' convictions in an unpublished memorandum opinion (App. A, *infra.*).

The district court did not issue a written opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on April 15, 1995. A petition for rehearing was filed on April 18, 1995; denied on May 19, 1995. This Court has jurisdiction pursuant to 28 U.S.C. §1254 (1) and Supreme Court Rules 13.1 and 13.4.

PROVISIONS OF LAW INVOLVED

United States Constitution, Amendment V:

> No person shall ... be deprived of life, liberty, or property without due process of law; ... .

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, ...

Title 25, United States Code, §7206(1):

Any person who --

(1) **Declaration under penalties of perjury.**--Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or ... .

(2) **Aid or assistance.**--Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, or a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; ... shall be guilty of a felony ... .

Title 18, United States Code, §1956(a)(1)(B)(i):

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--

(B) knowing that the transaction is

designed in whole or in part--

> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; shall be sentenced to a fine ... or imprisonment for not more than twenty years, or both.

Title 18, United States Code, Federal Rules of Criminal Procedure, Rule 52:

> (a) **Harmless Error**. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) **Plain Error**. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

On January 21, 1993, a six-count Indictment was filed against Defendants-Petitioners, DAVID KNAPP and GRK CORPORATION. This is a joint petition pursuant to Rules of the Supreme Court, Rule 12.2.

DAVID KNAPP was charged with the following violations: Count One, 18 U.S.C. §371 and 18 U.S.C. §1956(a)(1)(B)(i), conspiracy to engage in money laundering; Count Two, 18 U.S.C. §1956(a)(1)(B)(i), money laundering; Count Three, 26 U.S.C. §6050I(f)(1)(B) and §7206(1) and (2), filing false report of cash payments; Counts Four and Five, 18 U.S.C. §1956(a)(1)(B)(i), money laundering; and Count Six, 26 U.S.C. §6050(f)(1)(B) and §7206(1) & (2),

filing false report of cash payments (ER Exh. A).[1] GRK CORPORATION was charged in Counts Three and Six.

On August 10, 1993, DAVID KNAPP was convicted of Counts One, Four, Five, and Six of the Indictment. He was found not guilty of Counts Two and Three. GRK CORPORATION was found not guilty on Count Three of the Indictment and found guilty of Count Six (ER Exh. M). The relevant facts brought out at trial are set forth below.

The allegations in the indictment and the proof at trial involved the purchase of three vehicles from GRK CORPORATION dba Knapp Ford-Mercury by Ignacio Moreno. Ignacio Moreno was a drug dealer who sold over $30,000,000.00 of marijuana and cocaine through the 1980's (331:6-7; 314:1-2; 315:19-25; 269:4). Mr. Moreno had struck a deal with the Government whereby he would receive a maximum 15-year sentence with the possibility of a reduction depending upon the nature and extent of his cooperation. His deal with the Government included dismissal of charges against his mother, father and sister (275:14-17; 276:12-18). Prior to the deal Mr. Moreno was facing the possibility of life in prison (325:326-327).

In May of 1989 Mr. Moreno purchased a new 1989 Ford Mustang from Knapp Ford-Mercury for approximately $19,000.00, and registered it in the name of his wife, Linda Moreno (284:22-24; 702:4-6). A form 8300 (report of cash transaction) was filed in the name of Linda Moreno (629:9-14; 630:5-15). Moreno traded in a 1986 pickup and gave Knapp Ford-Mercury $7,000.00 to $8,000.00 cash as a downpayment (284:23-24). Moreno came in later and paid

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[1] All page references are to Reporter's Transcripts on Appeal unless otherwise noted. ER references Excerpts of Record on appeal.

the remaining balance in cash (285:17-24).

These facts comprise Counts Two and Three of the Indictment. DAVID KNAPP was acquitted of those charges.

Later, in late June or early July of 1989, Moreno came back to the dealership. He purchased a 1989 Lincoln Mark VII for approximately $29,000.00 (287:18-24). He made an $8,000.00 or $9,000.00 cash downpayment (290:4-6), and registered the car in the name of his uncle, Jose Ayala. Later that month, Moreno made another $7,000.00 to $8,000.00 payment on the car, again in cash (294:13-20). A week later, he made the final payment of about $7,000.00 (296:13-18). No form 8300 was filed (700:7-16). These facts comprised Count Four of the Indictment.

Later in July or August 1989, Mr. Moreno came back to Knapp Ford-Mercury and purchased a 1989 Ford one-ton truck. He asked that the vehicle be registered in the name of H & M Orchards, his parents' peach ranch (299:1-24). The purchase price of the vehicle was $19,000.00 or $20,000.00, and Moreno made an $8,000.00 or $9,000.00 cash downpayment on the truck (302:11-21). He paid the remaining balance, when he picked up the truck at Stiles Truck Body where the truck had been taken to put a flatbed on it (303:12-19).

A form 8300 was filed in the name of H & M Orchards with Daniel Hoyt, Moreno's brother-in-law, being listed on the form as well (638:17-24; 651:2-3). These facts comprise the allegations in Counts Five and Six.

The disputed issues at trial were DAVID KNAPP's knowledge and intent during the course of these transactions.

GRK CORPORATION, doing business as Knapp

Ford-Mercury, was founded in Manteca, California in 1957 (817:24-25). It is a corporation owned by Gerald Knapp, his sister Bernetta Allen, and his son DAVID KNAPP. DAVID KNAPP assumed the responsibilities of general manager in 1991 (911:15-25; 835:15-25).

In May of 1989, DAVID KNAPP was approached by Ignacio Moreno regarding the purchase of a car for his wife, Linda Moreno. DAVID KNAPP testified that Moreno told him that he had been referred by Jimmy Paxia, and was going to pay in cash. KNAPP knew Jimmy Paxia had dealt in drugs and told Moreno that the money would have to be reported (924:18-29; 925:16-18). Moreno denied this on the stand, but Agent Williams, the IRS case officer investigating the case, testified that Moreno told him during an earlier interview that KNAPP had said the money would have to be reported (805:25; 806:1-2).

At trial Moreno testified that KNAPP told him that he was aware how Moreno and "Jimmy" (Paxia) made their money, and that there were ways around his problem (282-283). Moreno testified KNAPP said that Moreno's name would not appear on the paperwork, even though he was paying for it, since "[s]he's (Moreno's wife) buying the car" (284).

KNAPP testified that Moreno stated that he was a big peach farmer and he had a lot of cash (930:15-16). Moreno never said anything about hiding assets (934:12). Two days after Moreno purchased the Mustang, KNAPP received a call from Rick Adams, a Manteca narcotics officer. Adams asked DAVID KNAPP who bought the Mustang convertible (1082:22-24). Another law enforcement officer had contacted Rick Adams and asked him to call DAVID KNAPP and ask him about a vehicle that was sold from Knapp Ford-Mercury to an individual in Oakdale. Adams

knew that the convertible had been sold because he had been into the dealership within a week before, and he noticed the Mustang on the lot (1083:7-9). KNAPP gave Adams all the details about the transaction, including the fact that Moreno had paid for the car, and it was registered in Linda Moreno's name (1082:22-24).

The next transaction involved the Lincoln Mark VII. Moreno testified that he came in by himself, dealt only with DAVID KNAPP and signed all documents in front of KNAPP in the name Jose Ayala (286:17-25; 287:8-9; 289:13-18). KNAPP testified that Moreno was with other people and that Moreno had told him his uncle was with him (956:1-5). KNAPP told Moreno to get his uncle and go into the finance office to sign the papers (956:12-20). Joe Rodriguez, the finance manager of Knapp Ford-Mercury, testified that a Hispanic male signed the contract in his office (769:25; 770:1-2). DAVID KNAPP was not in the office when the documents were signed (773:7-8).

The final transaction was the purchase of a Ford truck. Moreno came in and said he wanted a truck for his peach orchard (926:18-20). Again, Moreno said he dealt only with DAVID KNAPP, and he was alone. Leroy Judd, a salesman at Knapp Ford-Mercury, testified that he was involved in the truck transaction, that DAVID KNAPP had called him out to show the truck to Moreno. The first time the man was alone, but he came back later with someone he introduced to Judd as his foreman (760:2-11, 761:1-4). The men asked questions appropriate for peach farming, and Mr. Judd spent about an hour going over the characteristics of the truck with him (761:9-15).

Walter McDonald, the sales manager at Knapp Ford-Mercury, testified that he met some guys during the truck deal, and that he was responsible for generating the sales

documents and helping Moreno get in contact with the company to put the specialized bed on the truck (889:15-24, 890:17-24).

Shortly after he bought the Lincoln, Moreno was arrested in Texas with $149,000.00 cash in the trunk of his car (307:15-16). The car was seized (307:19). Stanislaus drug enforcement agent, Terry Mann, was contacted by the Texas rangers about Moreno (549:8-14). He went to Knapp Ford-Mercury to ask DAVID KNAPP about the Lincoln. Agent Mann testified that KNAPP was very cooperative (1079:4-5). He gave him all the information he asked for, including the information on the other two cars that Moreno had purchased, even though Mann was unaware of those purchases at the time (554:4-22). He told Mann that Moreno had purchased and paid for the cars in cash (1068:7-12, 1069:16-21).

Shortly after Agent Mann contacted DAVID KNAPP, DEA agent Giles contacted KNAPP. All of the details of the transactions were disclosed, and DAVID KNAPP was cooperative and gave correct information on all subsequent contacts (572:11-25).

KNAPP provided Giles with more information that he had when he went to the car lot. KNAPP told him about all three sales, and that Moreno had paid for the cars and registered them in other persons names (575:1-25; 576:1-24). There was no evidence introduced that DAVID KNAPP made any effort to conceal the source of the cash from the other people within the dealership. Bernetta Allen and Gerald Knapp both testified that they knew Moreno had been paying cash for the vehicles.

There was no evidence that DAVID KNAPP knew how the money was to be reported, only that it had to be

reported (926:1-4). DAVID KNAPP had never seen an 8300 form before Mr. Moreno came in, had never seen an instruction sheet for one, and had no idea of what information was required by the 8300 form (926:17-24). Bernetta Allen had been in charge of the office since the dealership opened, (705:14-22) and it was her responsibility to ensure that the 8300 forms were filled out properly (706:9-23). At the time of the filing of these 8300's, she thought that they were doing them correctly (695:25).

The fact that the 8300 form was not filed on the Lincoln was Ms. Allen's fault (700:20-24). The 8300 forms in this case were filled out by Tricia Metcalf (630:1-3; 638:23-24), a KNAPP employee of 16 or 17 years (649:3-7). She and Bernetta Allen sat down and tried to figure out the right way to fill out the form, using common sense (652:17; 662).

Because KNAPP and GRK CORPORATION were charged by indictment, the district court had jurisdiction pursuant to 18 U.S.C. §3231. The Court of Appeals for the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §1291 and §1294.

REASONS FOR GRANTING THE PETITION AND ISSUING A WRIT OF CERTIORARI

1. INTRODUCTION

On June 19, 1995, this Honorable Court issued its decision in United States v. Gaudin, No. 94-514. The case involved a criminal conviction for making material false statements in a matter within the jurisdiction of a federal agency, in violation of 18 U.S.C. §1001. Gaudin held that it was unconstitutional for the trial judge to refuse to submit the question of "materiality" of the false statements, an

element of the crime charged, to the jury.

In the underlying Ninth Circuit en banc opinion in that case, the dissenting opinion noted that requiring the question of "materiality" to be submitted to the jury overruled Ninth Circuit precedent in every other type of false statement prosecution, and conflicted with every other regional circuit in the country, as follows at 28 F3d 956-961:

> "C. *Implicit Overruling of Our Case Law in Other Areas*
>
> Although the majority only interprets 18 U.S.C. §1001, its rationale sweeps much farther. If materiality is a question of fact for the jury in section 1001 prosecutions, it's a question of fact in other contexts as well. The majority recognizes the clear implications of its holding by noting that 'it seems to be courting constitutional error to withdraw the materiality question from the jury in other perjury and false statement cases because of the difficulty in concluding that there is no factual component for jury determination.' Majority op. at 949.
>
> We have a substantial body of case law holding that materiality is a question of law under a variety of statutes. Thus judges, not juries, decide the materiality of false statements in tax returns. *United States v. Flake*, 746 F2d 535, 537-39 (9th Cir., 1984) (construing 26 U.S.C. §7206); *see id.* (confining *Valdez* to section 1001). Ditto for false statements to grand juries. *United States v. Prantil*, 764 F2d 548, 557 (9th Cir., 1985)

(construing 18 U.S.C. §1623), *United States v. Dipp*, 581 F2d 1323, 1328 (9th Cir., 1978) (discussing information judge needs to make materiality determination under section 1623), *United States v. Sisack*, 527 F2d 917, 920 n. 2 (9th Cir., 1975) (judge must decide materiality under section 1623), *United States v. Percell*, 526 F2d 189, 190 (9th Cir., 1975) (same); for false statements in applications for payments in federally-approved plans for medical assistance, *United States v. Larm*, 824 F2d 780, 783-84 (9th Cir., 1987) (construing predecessor to 42 U.S.C. §1320a-7b), *see id.* at 783 (noting *Valdez* has been limited to section 1001); and for perjury, *United States v. Clark*, 918 F2d 843, 845-46 (9th Cir., 1990) (construing 18 U.S.C. §1621), *see id.* (confining *Valdez* to section 1001 because circuit had done so twice before), *Vitello v. United States*, 425 F2d 416, 423 (9th Cir., 1970) (construing section 1621).

The majority tries to hedge its bets by suggesting that the effect of its ruling on 'future prosecutions under other statutes' is somehow an open question. Majority op. at 947 n. 2. This is difficult to square with the majority's ominous language about 'courting constitutional error' if the question of materiality is withdrawn from the jury 'in other perjury and false statement cases.' *Id.* at 949. As a practical matter, this warning may be sufficient to prevent district courts from following our earlier case law, particularly since the aggrieved party--the

government--can't appeal.

It's fair to say, therefore, that we have effectively (though tacitly) laid these cases to rest. In so doing, we unleash a series of further conflicts with our sister circuits. Take, for example, false statements in tax returns. By abandoning *Flake*, we create a conflict with six other circuits--all of which have assigned the materiality inquiry to the judge. [Citations omitted]

Or, take our cases holding that judges should decide the materiality of false statements made to a grand jury. *See Prantil*, 764 F2d at 557 (construing 18 U.S.C. §1623); *Dipp*, 581 F2d at 1328 (same); *Sisack*, 527 F2d at 920 n. 2 (same); *Percell*, 526 F2d at 190 (same). In sweeping aside these cases, the majority creates a conflict with fifty-one cases and--not surprisingly--every other regional circuit. [Citations omitted]

In quietly burying our rule that a judge decides the materiality of perjured statements under 18 U.S.C. §1621, *see United States v. Clark*, 918 F2d 843, 845-46 (9th Cir., 1990); *Vitello v. United States*, 425 F2d 416, 423 (9th Cir., 1970), the majority generates yet another conflict--this time with six other circuits. [Citations omitted]

The disruption is greater still. I've only mentioned five statutes--ones where our circuit has already held who decides

> materiality. But the majority's theory easily covers all statutes that contain a similar materiality requirement. How many other criminal statutes punish those who make material false statements to a government agency? My research discloses forty-three that have explicit materiality requirements and another fifty-four where such a requirement is probably implied. And, of course, other courts have already held that materiality in a number of these statutes should be decided by the judge, and will no doubt interpret the others consistent with their prevailing case law."

This petition squarely presents the question of the application of this Honorable Court's decision in United States v. Gaudin NO. 94-514 (1995) to other federal false statement crimes; namely a conviction for violating 26 U.S.C. §7206(1)(2). The Ninth Circuit refused to grant petitioners' suggestion for rehearing en banc on this question. It instead held that in a prosecution for violation of 26 U.S.C. §7206(1)(2), the "materiality" of the false statement was a question for the judge, not the jury, pursuant to United States v. Flake 746 F2d 535 (9th Cir., 1984), cert. denied 469 U.S. 1225 (1985).

This petition also squarely presents the question of the application of United States v. Gaudin and Sullivan v. Louisiana 508 U.S. ____, 113 S.Ct. 2078 (1993) to jury instructions which left out essential elements of the crimes of conspiracy to money launder, money laundering, and filing a false currency transaction report with the IRS.

Finally, this petition squarely presents the question left unresolved in United States v. Gaudin. Chief Justice

Rehnquist and Justices O'Connor and Breyer noted that the Government had not argued in United States v. Gaudin that the error was either harmless or not plain. No objection to the instructions given in this case was made to the trial court. Resolution of this petition will necessarily resolve whether the errors asserted herein are subject to harmless error analysis, plain error analysis, or are reversible per se.

In relation to each of these crimes, precedent existing prior to trial or prior to the Court of Appeals decision dictated that the instructions at issue left our or misstated an element of the crime charged. The Supreme Court authority addressed herein was not distinguished in the opinion of the Court of Appeals affirming petitioners' convictions.

2. THE JURY INSTRUCTIONS PERTAINING TO A VIOLATION OF 26 U.S.C. §7206(1)(2)

In relation to the counts charging a violation of 26 U.S.C. §7206 by filing a false currency transaction report with the IRS, the trial court first instructed the jury that materiality was an element of the crime (ER Exh. F, Instr. No. 22). The trial court then instructed the jury that it need not be concerned whether any false statement was material (ER Exh. F, Instr. No. 24).

This was precisely the same procedure as that followed by the trial court in Gaudin, and resulted in precisely the same constitutional error. The question of "materiality" was never submitted to the jury.

The willfulness instruction given in connection with these transaction reporting charges was also erroneous. It set forth:

As act was done willfully, as that term is used

> in the preceding instruction [on filing a false form 8300], if a defendant acted voluntarily and intentionally to violate a known legal duty or acted with a bad purpose or evil motive. Negligent conduct is not sufficient to constitute willfulness. [Emphasis added].

The underlined portion of the instruction authorized a finding of willfulness without finding that petitioners acted voluntarily and intentionally to violate a known legal duty, in violation of Cheek v. United States 498 U.S. 192, 112 L.Ed.2d 617, 111 S.Ct. 604 (1991). Pursuant to Frances v. Franklin 471 U.S. 307 at 322, 105 S.Ct. 1964 at 1975, 85 L.Ed.2d 472 (1985), United States v. Stein 37 F3d 1407, (9th Cir., 1994), cert. denied, 63 U.S.L.W. 3628 (Feb. 21, 1995), and now United States v. Gaudin, an appellate court is powerless to determine which of two instructions on the elements of a crime, one correct and one legally incorrect, the jury applied. Accordingly, the currency transaction reporting conviction against MR. KNAPP and GRK CORPORATION should have been reversed by the Court of Appeals.

3. THE JURY INSTRUCTIONS PERTAINING TO CONSPIRACY TO MONEY LAUNDER

Ninth Circuit Pattern Instruction No. 8.05A, used in this case, sets forth the following:

> The defendant is charged in [Count _ _ of] the indictment with conspiring to ___ in violation of Section ____ of Title ____ of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable

doubt:

> First, [beginning on or about ___ and ending on or about ____] [starting sometime before ____] there was an agreement between two or more persons to commit at least one crime as charged in the indictment;
>
> Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and
>
> Third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy, with all of you agreeing on a particular overt act that you find was committed. (ER Exh. F, Instr. No. 16).

This instruction erroneously omits knowledge of an unlawful object of the conspiracy, an element of the federal crime of conspiracy (Ingram v. United States 360 U.S. 672, 79 S.Ct. 1314, 1319 3.L.Ed. 1503 [1959]). In United States v. Hegwood 977 F 492, 494-495 (9th Cir., 1992) the Ninth Circuit held:

> "In its opening charge to the jury, the district court defined 'conspiracy' as requiring 'an agreement between two or more persons to commit a crime, of which either or both Defendants become a member, knowing at least one of its objects, and at least one member performs at least one overt act to carry out the conspiracy.' The government concedes that this statement of the law was

inaccurate because it omitted intent to commit the substantive crime as an element of conspiracy."

A defendant conspirator must know of an unlawful object of the conspiracy in order to intend that the unlawful object be accomplished (Ingram v. United States 360 U.S. 672, 79 S.Ct. 1314, 1319 [1959]; United States v. Kraslovich 819 F2d 253, 255-256 [9th Cir., 1987]).

The conspiracy instruction given in this case omitted that essential element of the federal crime of conspiracy. This was a constitutional error pursuant to Sullivan v. Louisiana 508 U.S. ___ 113 S.Ct. 2078 (1993), and now United States v. Gaudin No. 94-514 (1995). Defendant KNAPP's conspiracy conviction should have been reversed by the Court of Appeals.

4. THE JURY INSTRUCTIONS PERTAINING TO MONEY LAUNDERING

In United States v. Stein 37 F3d 1407 (9th Cir., 1994), virtually identical instructions on money laundering as were given in this case led to the reversal of the defendant's conviction for structural error (ER Exh. F, Instr. Nos. 18, 19). Stein was filed while this case was pending before the Court of Appeals.

The critical error addressed in United States v. Stein was repeated in this case; that is, the jury was instructed, without further explanation, that it could find that MR. KNAPP knew that the money came from some form of unlawful activity (money laundering element #2, ER Exh. F, Instr. No. 18), merely by concluding that he was aware of his actions, without ever determining that he *in fact* knew of the unlawful source of the funds.

This is made clear in Stein by the Court in that case, as follows, at 1409:

> Stein argues part of the district court's instructions to the jury on the money laundering counts were negated by a general instruction on when an act is done "knowingly," and this relieved the prosection of its burden to prove an essential element of the money laundering counts. [Emphasis added].

Pursuant to Frances v. Franklin (1985) 471 U.S. 307 at 322, United States v. Stein 37 F3d 1047 (9th Cir., 1994), and now United States v. Gaudin, reversal of MR. KNAPP's money laundering convictions is warranted because an appellate court is not free to presume which instructions on the elements of the crime the jury followed.

This money laundering instructional error was compounded by the trial court's erroneous conspiracy instructions. In addition to failing to instruct the jury that the defendant must know of an unlawful object of the conspiracy, the trial court gave the following charge to the jury:

> "Once you have decided that the defendant was a member of a conspiracy, the defendant is responsible for what other conspirators said or did to carry out the conspiracy, whether or not the defendant knew what they said or did. (Vol 6 RPT TR 1121: 21-25; Emphasis added; ER Exh. F, Instr. No. 16).

Of course, the claim of the Government's informant witness, Ignacio Moreno, was that he engaged in the three

vehicle sales transactions with MR. KNAPP intending to launder his drug trafficking proceeds.

Petitioners submit that applying the instructions as a whole, the jury was not required to find that MR. KNAPP knowingly engaged in money laundering. Under the instructions given, the jury was not required to find against him on each element of the crime of money laundering, in violation of United States v. Gaudin.

5. GAUDIN ERROR SHOULD BE REVERSIBLE PER SE

Griffith v. Kentucky 479 U.S. 331, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987) held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."

A corollary to this rule is the supervening-decision doctrine whereby an appellate court will consider a change in the criminal law in the appellant's favor where the law was so well-settled at the time of trial that any attempt to challenge it would have appeared pointless (United States v. Washington 12 F3d 1128, 1139 (D.C. Cir., 1994); United States v. Byers 740 F2d 1104, 1132-33 (D.C. Cir., 1984) (en banc) (Robinson, Jr., concurring); id. at 1109, 1115-16 nn. 6 & II [Scalia, J., writing for plurality]).

Petitioners are entitled to the benefit of Gaudin and should not be penalized for failing to make at trial objections which were at that time futile.

Notwithstanding the pointlessness of any particular instructional challenge before the trial court, United States v.

Gaudin No. 94-514 (1995) holds that a criminal defendant has not received his constitutional right to a jury trial when the jury has not passed on an element of the crime. This core right is set forth in Sullivan v. Louisiana 508 U.S. __, 113 S.Ct. 2078 at 2082 (1993), wherein the majority cited the dissent of Justice Blackman in Rose v. Clark 478 U.S. 570, 106 S.Ct. 3101 at 3114, 92 L.Ed.2d 460 (1986), and the dissent of Justice Stevens in Pope v. Illinois 481 U.S. 497, 107 S.Ct. 1918 at 1926, 95 L.Ed.2d 439 (1987).

Justice Blackman wrote the following in Rose v. Clark at the page cited in Sullivan v. Louisiana:

> "Findings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime. See *Connecticut v. Johnson*, 460 U.S.73, 95, and n. 3 [103 S.Ct. 969, 982, and n. 3, 74 L.Ed.2d 823] (1983) (POWELL, J., dissenting)." *Cabana v. Bullock*, 474 U.S. 376, 384-385, 106 S.Ct. 689, 696, 88 L.Ed.2d 704; see also *Cole v. Arkansas*, 333 U.S., at 202, 68 S.Ct., at 517. The Constitution does not allow an appellate court to arrogate to itself a function that the defendant, under the Sixth Amendment, can demand be performed by a jury.

Justice Stevens' dissent in Pope v. Illinois included the following at the page cited in Sullivan v. Louisiana:

> It is fundamental that an appellant court (and for that matter, a trial court) is not free to decide in a criminal case that, if asked, a jury *would* have found something that it did not

> find. We have consistently rejected the possibility of harmless error in these circumstances. ... No court could ever determine that the instructions on the element were superfluous, since the error in the instructions went to the ultimate fact that the juries were required to find. *Rose v. Clark* did not modify the precedents requiring that a jury find all of the elements of a crime under the proper standard, any more than it modified the Sixth Amendment's provision that "[i]n all criminal prosecutions, the accused shall enjoy the right to a ... trial by an impartial jury." (Original emphasis)

A violation of the right to have a jury pass on each element of a crime is a "plain error" affecting substantial rights. Prior to Rose v. Clark 478 U.S. 570 (1986), Frances v. Franklin 471 U.S. 307, 322, 105 S.Ct. 1965 at 1975, 85 L.Ed.2d 344 (1985) held:

> Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict.

Petitioners submit that the errors addressed herein, whether construed as plain error affecting a substantial and core constitutional right to a jury trial or not, warrant reversal of their convictions.

CONCLUSION

For the foregoing reasons petitioners DAVID R.

KNAPP and GRK CORPORATION submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

NUTTALL BERMAN ATTORNEYS

DATED: July 28, 1995

/s/

ROGER T. NUTTALL, Attorney for Petitioners

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

DAVID R. KNAPP,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

GRK CORPORATION, dba Knapp Ford/ Mercury,

Defendant-Appellant.

No. 94-10022
D.C. No. CR-93-05019-OWW

No. 94-10023
D.C. No. CR-93-05019-OWW

APPENDIX A

FILED
April 5, 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Argued and Submitted November 17, 1994
San Francisco, California

Before: ALARCON and HALL, Circuit Judges, and
KING,** District Judge

Defendants/Appellants David R. Knapp and GRK Corporation dba Knapp Ford/Mercury (collectively "Knapp") appeal jointly from a conviction and sentence for (1) conspiracy to money launder, 18 U.S.C. § 371; (2) money laundering, 18 U.S.C. § 1956(a)(1)(B)(i); and (3) filing false currency transaction reports, 26 U.S.C. §§ 6050I(f)(1)(B) and 7206(1) & (2). We have jurisdiction pursuant to 28 U.S.C. § 1291, and affirm.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

DISCUSSION

I. Jury Instructions.

The standard of review of a district court's denial of a proposed jury instruction is unresolved in this circuit. United States v. Woodley, 9 F.3d 774, 779 (9th Cir. 1993). The standard is either de novo or abuse of discretion. Id. "We examine 'whether or not the instructions taken as a whole were misleading or represented a statement inadequate to guide the jury's deliberations." United States v. Powell, 955 F.2d 1206, 1210 (9th Cir. 1992) (quoting United States v. Kessi, 868 F.2d 1097, 1101 (9th Cir. 1989)). We need not resolve the standard of review here because the conflict is not dispositive; Knapp's arguments fail under either standard.

A. Conspiracy Instructions.

The trial court gave a virtually unmodified version of Ninth Circuit Model Criminal Instruction 8.05A on conspiracy:

> The defendant David R. Knapp is charged in Count 1 of the indictment with conspiracy to engage in money laundering in violation of United States law. In order for a defendant to be found guilty of that charge, the United States must prove each of the following elements beyond a reasonable doubt:
>
> First, beginning on or about May 9th, 1989, and ending on or about October 6, 1989, there was an agreement between two or more persons to commit at least one crime charged in the indictment; second, the defendant became a member of the conspiracy knowing of at least one of its objects and

intending to help accomplish it; and third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy. All of you must agree on a particular overt act that you find was committed.

. . . .

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. . . . You must find there a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy. ***And here the object of the conspiracy in all three cases is money laundering.***[1]

. . . .

An overt act does not, of itself, have to be unlawful. . . . The government is not required to prove that the defendant personally did one of the overt acts. Once you have decided that the defendant was a member of a conspiracy, the defendant is responsible for what other conspirators said or did not carry out the conspiracy, whether or not the defendant knew what they said or did.

. . . .

Even though a defendant did not directly conspire with every other conspirator in the overall scheme, the defendant, would, in effect, have agreed to participate in the conspiracy if it is proved beyond a reasonable doubt that the defendant conspired with one or more conspirators to carry out at least one of the objects of the conspiracy, the defendant knew or had reason to know that other conspirators were involved with those with whom the defendant directly

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[1]This sentence differs from the pattern instruction and is not in the written copy of the court's instructions.

conspired, and the defendant had reason to believe that whatever benefits the defendant might receive from the conspiracy were probably dependent upon the success of the entire venture. (Emphasis added).

1. Amendment of the Indictment.

Knapp argues that the emphasized phrases materially amended the indictment by allowing the jury to convict for a conspiracy other than to money launder. United States v. Vowiell, 869 F2d 1264, 1271 (9th Cir. 1989) ("It is plain error for a district court to give instructions that permit the jury to convict the defendant for a crime that was not charged, because the court may not substantially amend the indictment through its instructions to the jury.") (citations and quotation marks omitted). The 7-count indictment contained two substantive crimes--three counts of money laundering and two counts of filing false currency transaction reports--but only charged for conspiracy to money launder.[2] Thus, Knapp contends that the instructions allowed the jury to convict him for conspiring to file false currency transactions reports.

The court reviews de novo whether there has been a material amendment of an indictment. United States v. Armstrong, 909 F.2d 1238, 1241 (9th Cir.), cert. denied, 498 U.S. 870 (1990). If there was error here, however, it was not so much an amendment to the indictment as it was an incorrect explanation of the conspiracy charge in the indictment. No one is contending that the government intended to convict Knapp for conspiracy to file false reports.

Knapp argues that, taking the instructions literally,

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[2]The seventh count was for forfeiture, 18 U.S.C. § 982.

the jury could have found a "conspiracy to money launder" by finding that Knapp agreed with Moreno to file false currency transaction reports. Taken in context, however, it is more likely that the jury indeed found a "conspiracy to money launder" by finding that Knapp agreed with Moreno to money launder.

In its instructions, the trial court clearly explained that it was defining each count separately. The first sentence of the instruction quoted previously reads: "[t]he defendant David R. Knapp is charged in Count 1 of the indictment with conspiracy to engage in money laundering in violation of United States law" (emphasis added). After the conspiracy instruction, the court explained: "[n]ow I'm going to define the elements of the crime of filing a false report." Additionally, the verdict form was split into counts; count one was titled "18 USC 371 AND 1956(a)(1)(b)(I) - Conspiracy to Engage in Money Laundering." (emphasis added).

When reading the written instructions, the trial court apparently realized that the references in the pattern instruction to "at least one crime in the indictment" were potentially confusing. The court extemporaneously added the sentence (highlighted above): "[a]nd here the object of the conspiracy in all three cases [all three vehicle transactions] is money laundering."[3] This sentence clarified that the conspiracy was for money-laundering and not conspiracy to commit some other crime.

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[3]Knapp also contends that, by this phrase, the court directed a verdict against him on a disputed element of the conspiracy count. He apparently argues that the phrase told the jury that there was a conspiracy to money-launder. Taken in context, however, the court clearly was referring to the instructions, not to the substance of the count.

Additionally, two of the overt acts of the money-laundering conspiracy count were filling out IRS Form 8300s in the name of others besides Moreno. In essence, the false currency report counts also constituted overt acts. Thus, even if the jury misunderstood the instruction to mean that false reporting was required for money laundering, the error was harmless.

In sum, when reading the instructions as a whole, we find no reversible error.

2. Unanimity Instruction.

Knapp also argues that the conspiracy instruction was insufficient because the court did not give a specific unanimity instruction. Knapp cites United States v. Gilley, 836 F.2d 1206, 1211-13 (9th Cir. 1988). This argument fails.

In Gilley, this court held:

> [u]sually a general unanimity instruction suffices. In United States v. Echeverry, 698 F2d 375 (9th Cir. 1983), modified, 719 F.2d 974 (9th Cir. 1983), however, we held that a different rule applies when a "genuine possibility" of juror confusion exists.

836 F.2d at 1211 (citation omitted). Gilley involved "a genuine possibility that the jurors were not unanimous as to the conjunction of two of the material elements of the crime." Id. at 1212. In turn, Echeverry involved multiple schemes where defendant committed different acts, and the jury indicated confusion concerning multiple conspiracies. 719 F.2d at 975.

Here, there is no genuine possibility of such jury

confusion. The conspiracy here was relatively simple. As outlined in the indictment, the conspiracy involved Knapp agreeing with Moreno, and others unknown to the grand jury, to money launder between May 9, 1989 and Oct. 6, 1989. The indictment lists nine possible overt acts. A general unanimity instruction was sufficient. United States v. Ferris, 719 F.2d 1405 (9th Cir. 1983). Moreover, Knapp did not object on these grounds below and did not submit a conspiracy instruction with specific unanimity provisions.

3. Knapp's Defense Instruction.

Knapp argues that the court erred in refusing the following instruction explaining his defense theory:

> DAVID KNAPP contends that he never agreed with IGNACIO MORENO to conceal the source of money, or that he knew the money was derived from narcotics trafficking.

This proposed instruction added little if anything to the conspiracy instructions given by the court. The court instructed that the government must prove the elements of conspiracy beyond a reasonable doubt. Refusing the instruction was not error. United States v. Lopez-Alvarez, 970 F.2d 583, 597 (9th Cir.) ("nor is [a defendant] entitled to an instruction that merely duplicates what the jury has already been told"), cert. denied, 113 S. Ct. 504 (1992).

B. Money-Laundering Instruction.

1. Taint by Conspiracy Instructions.

Knapp argues that error in the conspiracy instructions tainted the money-laundering instructions. He again focuses on the phrase "[a]nd here the object of the conspiracy in all

three cases is money laundering. However, as explained above, the phrase taken in context merely explained the conspiracy count. The phrase was not misleading and did not direct the jury to find Knapp guilty on the substantive money-laundering counts.

2. Pinkerton Liability.

Next, Knapp takes issue with the highlighted sentence in the following paragraph of the conspiracy instruction.

> An overt act does not, of itself, have to be unlawful. A lawful act may be an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. The government is not required to prove that the defendant personally did one of the overt acts. Once you have decided that the defendant was a member of a conspiracy, the defendant is responsible for what other conspirators said or did to carry out the conspiracy, whether or not the defendant knew what they said or did.

Knapp contends that the sentence imposed Pinkerton liability; he asserts error in not giving a corresponding foreseeability instruction. He appears to be arguing that the jury could have convicted him on the substantive money-laundering counts based on Moreno's money-laundering activities in a conspiracy to file false currency reports.

Taken in context, however, the sentence refers to overt acts making up the conspiracy, not other substantive crimes committed in furtherance of the conspiracy. The sentence correctly instructed that Knapp need not have personally committed an overt act towards commission of the objective of the conspiracy.

3. Effect of Ratzlaf v. United States.

Knapp next contends that under 18 U.S.C. § 1956(a)(1)(B)(i) the government is required to prove he knew money laundering was unlawful. The trial court gave no such instruction, thus Knapp asserts error. Knapp relies on Ratzlaf v. United States, 114 S. Ct. 655 (1994).

In Ratzlaf, the Court was construing the statutory language "willfully violated." The court reasoned

> We do not dishonor the venerable principle that ignorance of the law generally is no defense to a criminal charge. In particular contexts, however, Congress may decree otherwise. That, we hold, is what Congress has done with respect to 31 U.S.C. § 5322(a) [providing "a person willfully violating this subchapter. . . . shall be fined not more than $250,000, or imprisoned for not more than five years, or both"] and the provisions it controls.

Id. at 663 (citations omitted). In this case, the money laundering statute at issue, 18 U.S.C. § 1956(a)(1)(B)(i), does not require "willfulness." Thus, Ratzlaf does not apply. See United States v. Santos, 20 F.3d 280, 284 n.3 (7th Cir. 1994) ("Unlike the criminal enforcement provision at issue in Ratzlaf, 31 U.S.C. § 5322(a), the money laundering statutes . . . 18 U.S.C. §§ 1956(a)(1)(B)(i) and 1956 (a)(3)(A), do not contain a willfulness requirement and, instead, contain specific and detailed requirements concerning the defendant's intent and knowledge.").

4. Effect of United States v. Stein.

The final issue on the money-laundering counts is whether the general jury instruction defining "knowingly"

negated an element of money laundering from the jury's consideration. Knapp cites to the recent decision, United States v. Stein, 37 F.3d 1407 (9th Cir. 1994), cert. denied, 63 USLW 3628 (Feb. 21, 1995).

"Whether a jury instruction misstates elements of a statutory crime is a question of law reviewed de novo." United States v. Johnson, 956 F.2d 197, 199 (9th Cir. 1992).

The Stein court reversed convictions for money laundering because a general instruction defining "knowingly" conflicted with the money-laundering instruction. The court distinguished between the two types of "knowledge" in money laundering: "[w]hile to sustain a conviction the defendant must have known that the primary predicate activity (in this case [Stein] securities, mail and wire fraud) was unlawful, he need not have known that the secondary act of laundering the proceeds was unlawful." Stein, 37 F.3d at 1410 (citations omitted).

In Stein, the trial court instructed the jury "the government must prove. . . the defendant knew that the property represented the proceeds of securities fraud, mail fraud, or wire fraud." Id. The court then gave a general instruction on knowledge: "[a]n act is done knowingly if the defendant is aware of the act and doesn't act through ignorance, mistake or accident. The Government is not required to prove that the defendant knew that his acts or omissions were unlawful." Id. This general instruction is Ninth Circuit Model Criminal Instruction No. 5.06 (which was given in Knapp's case). The Stein court held:

> This general instruction conflicts with the district court's previous instruction on money laundering, because it purports to apply to all of the defendant's

actions--his predicate acts of fraud as well as his secondary act of money laundering.

> Where two instructions conflict, a reviewing court cannot presume that the jury followed the correct one. Here, by applying the later general instruction, a jury could convict Stein without finding that he knew his predicate acts of fraud were unlawful. Taken as a whole, the instructions omitted and element of the offense. . . . Such error cannot be harmless.

Id.

The instructions in Knapp's case were similar, but with two critical differences. Here, instruction No. 18 gave the elements of money laundering:

> To establish the crime [of money laundering], the government must prove beyond a reasonable doubt the following four elements:
>
> (1) The defendant knowingly conducted a financial transaction.
>
> (2) The defendant must know that the transaction involved property which represented the proceeds of some form of unlawful activity.
>
> (3) The transaction involved property which in fact was drug trafficking proceeds.
>
> (4) The defendant engaged in the transaction with the intent to conceal or disguise the nature, location, source, ownership, or control of property which was drug trafficking proceeds. (emphasis

added).

As in Stein, the money-laundering instruction was followed immediately by a general instruction defining "knowingly":

> And act is done knowingly if the defendant is aware of the act and does not act or fail to act through ignorance, mistake or accident. As to money laundering, the government is not required to prove that the defendant knew that this acts or omissions were unlawful. (emphasis added).

The emphasized phrase "as to money laundering" distinguishes the latter instruction from the one given in Stein. In Stein, the court reasoned that the "knowingly" instruction purported to apply to both the object of the conspiracy and to the money laundering act itself. The added phrase "as to money laundering" made sufficiently clear that the corresponding sentence applied only to the crime itself.

Moreover, the court gave the following additional instruction not given in Stein:

> The term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the defendant knew that the property involved in the transaction represented proceeds from some form, though not necessarily which form of activity that constitutes a felony under federal or state law. Drug trafficking is a felony under federal or state law.

Combined, these differences distinguish Stein. These differences directly address the possibility that the jury could have omitted the second element of money laundering and

convicted without finding Knapp knew the money represented illegal drug proceeds.

C. Currency Reporting Counts

Next, Knapp attacks his convictions under 26 U.S.C. §§ 7206(1) & (2) for incorrectly completing the IRS Form 8300s.

1. Willfulness Definition.

Knapp argues that the following "willfulness" instruction given by the trial court was wrong:

> An act was done willfully, as that term is used in the preceding instruction [on filing a false form 8300], if a defendant acted voluntarily and intentionally to violate a known legal duty or acted with a bad purpose or evil motive. Negligent conduct is not sufficient to constitute willfulness. (emphasis added).

Knapp argues that the highlighted phrase is incorrect. He cites United States v. Powell, 955 C.2d 1206 (9th Cir. 1991) purportedly as support. His argument fails.

Indeed, the Powell court noted that "[a]n instruction on willfulness need not include "bad faith" or "bad purpose. Neither bad purpose nor evil motive is an independent element of a willful failure to file under the statutory requirement to file tax returns, 26 U.S.C. § 7203." 955 F.2d at 1210 (citations omitted). However, the court went on to hold: "[t]hus the government may prove willful conduct by establishing either: (1) that the defendant acted with a bad purpose or evil motive, or (2) that the defendant voluntary, intentionally violated a known legal duty." Id. at 1211 (emphasis in original). The court's instruction here

tracks Powell verbatim, and, accordingly, we find no error.

2. Effect of United States v. Gaudin.

Next, Knapp asserts that pursuant to the recent Ninth Circuit en banc decision, United States v. Gaudin, 28 F.3d 943 (9th Cir. 1994), cert. granted, 115 S. Ct. 713 (Jan. 5, 1995) (No. 94-514), the trial court erred in treating the "materiality" element of the charges under 26 U.S.C. §§ 7206(1) & (2) as a question of law, rather than submitting it to the jury.

In Gaudin, the court held by a 6-5 margin that "materiality" is a question of fact in a charge under 18 U.S.C> § 1001. Gaudin upheld an earlier decision holding the same, United States v. Valdez, 594 F.2d 725, 728-29 (9th Cir. 1979). The Gaudin court reasoned that recent Supreme Court authority, beginning with In re Winship, 397 U.S. 358 (1970) and most recently in Sullivan v. Louisiana, 113 S. Ct. 2078 (1993), has emphasized the constitutional requirement that the jury must find a defendant guilty beyond a reasonable doubt of each element of a crime with which the defendant is charged. Gaudin, 28 F.3d at 945-46.

Because Gaudin decided the materiality question under 18 U.S.C. § 1001, it does not control the question under 26 U.S.C. § 7206(1) & (2) at issue here. The controlling Ninth Circuit decision on the precise issue before the court is United States v. Flake, 746 F.2d 535 (9th Cir. 1984), cert. denied, 469 U.S. 1225 (1985).

In Flake, the appellant argued that because Valdez required materiality to be decided by a jury under § 1001, it must also do so under § 7206(1). The Flake court disagreed, adopting precedent directly on point from other circuits, and held that materiality is a question of law under

26 U.S.C. § 7206(1). 746 F.2d at 537. Gaudin notwithstanding, Flake is still good law. Gaudin did not overrule Flake, which is directly on point on the issue now before the court. Therefore, the trial court committed no error.

II. Alleged Sentencing Errors.

Knapp also challenges his sentence on several grounds.

A. Acceptance of Responsibility.

Despite a full jury trial, Knapp argued that he deserved a 3-point reduction in his sentence under Sentencing Guidelines § 3E1.1 for acceptance of responsibility because he cooperated fully in the grand jury investigation.

A district court's refusal to grant a reduction for acceptance of responsibility is a factual determination; the clearly erroneous standard applies. United States v. Innie, 7 F.2d 840, 847-48 (9th Cir. 1993), cert. denied, 114 S. Ct. 1567 (1994).

Knapp's presentence report stated that he did not demonstrate an acceptance of responsibility. After objections and a response, the trial court found that Knapp never admitted that he committed money laundering. There is nothing in the record to leave a definite and firm conviction that this finding was wrong.

While the sentencing guidelines do not preclude a finding of acceptance of responsibility if a defendant proceeds to trial, such occasions are rare. U.S.S.G. § 3E1.1, Application Note 2. The government acknowledges

that Knapp admitted he sold vehicles to Moreno, but points out that he has never admitted that he intended to launder money. To accept responsibility, one should admit the requisite criminal intent. United States v. Barron-Rivera, 922 F.2d 549, 552-53 (9th Cir. 1991). The district court committed no clear error here.

B. Refusal to Depart Downward.

Several of Knapp's arguments concern discretionary decisions of the court refusing to depart downward. The asserted grounds for departure included (1) aberrant behavior, (2) the offense was outside the heartland, and (3) extraordinary family or business circumstances. These arguments fail because a trial court's refusal to depart downward from the sentencing guidelines is not subject to appellate review. United States v. Cippollone, 951 F.2d 1057, 1058 (9th Cir. 1991). However, a court's determination that it has no authority to depart is a question of law which is reviewable. United States v. Cook, 938 F.2d 149, 152 (9th Cir. 1991).

The court determined it had no authority to depart downward for Knapp's rehabilitation from drug abuse prior to his arrest, relying on United States v. Martin, 938 F.2d 162, 163-64 (9th Cir. 1991), cert. denied, 112 S. Ct. 1679 (1992) (holding that U.S.S.G. §§ 5H1.3 and 5H1.4 precluded downward departures for rehabilitation from drug abuse). The Martin court reasoned that permitting such departures would unfairly benefit defendants who have drug problems; such departures would not be available to defendants without drug problems. Although Martin involved post-arrest rehabilitation, the reasoning also applies here with pre-arrest rehabilitation. We find no error.

The court also determined it could not depart

downward for Knapp's alleged diminished mental capacity. Knapp submitted evidence that he was suffering from something similar to a post-traumatic stress disorder resulting from the treatment he received while recovering from drug usage. U.S.S.G. § 5K2.13 allows a downward departure for diminished capacity if a defendant's non-violent offense was committed while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants. Assuming Knapp actually suffered diminished capacity was a direct and foreseeable result of his prior voluntary use of drugs. The court correctly found it could not depart downward in Knapp's case.[4]

C. Alleged Bias.

Knapp argues that the trial court misconstrued the record and demonstrated bias in sentencing him. This argument is without merit. Knapp cites some incidents where the court appeared to criticize Knapp for past drug use. Such comments do not require reversal, even if the court was ill-disposed towards Knapp. Liteky v. United States, 114 S. Ct. 1147 (1994) (a trial judge after completion of trial might be ill-disposed towards a defendant; such opinions are proper unless the court displays a deep-seated favoritism or antagonism that renders a fair judgment impossible). Finally, Knapp complains that the trial judge revealed during sentencing that he had represented

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[4]Knapp cites United States v. Cantu, 12 F.3d 1506 (9th Cir. 1993) in support. The court indicated that a defendant whose reduced capacity was caused in part by drug or alcohol abuse is not automatically disqualified from a downward departure. 12 F.3d at 1514 (emphasis in original). Here, the diminished capacity was caused entirely by abuse of drugs.

automobile dealers when in private practice. This information is insignificant to show bias.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

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Defendant-Appellant.

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GRK CORPORATION, dba Knapp Ford/ Mercury,

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No. 94-10022
D.C. No. CR-93-05019-OWW

No. 94-10023
D.C. No. CR-93-05019-OWW

FILED
May 19, 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ORDER

Before: ALARCON and HALL, Circuit Judges,
and KING,* District Judge

The panel has voted to deny appellants' petition for rehearing. Judge Hall has voted to reject the suggestion for rehearing en banc and Judges Alarcon and King recommend rejection.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing in DENIED and the suggestion for rehearing en banc is REJECTED.

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*Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF FRESNO

I am employed in the County of Fresno, State of California. I am a citizen of the United States, over the age of 18 and not a party to the within action; my business address is: 2333 Merced Street, Fresno, California 93721.

On July 31, 1995, I served the foregoing document described as **PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT** on the parties listed below in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

CHARLES J. STEVENS
United States Attorney
KENNETH J. MELIKIAN
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I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Fresno, California.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Dated July 31, 1995, at Fresno, California.

/S/

LISA HOKE